A

L'GRANDE DEVELOPMENT SDN BHD

v.

BUKIT CERAKAH DEVELOPMENT SDN BHD

B

HIGH COURT MALAYA, KUALA LUMPUR
KANG HWEE GEE J
[SUIT NO: S1-22-241-2000]
2 APRIL 2007

C ***CONTRACT:*** *Building contract- Construction - Agreement in writing - Defendant's failure to settle interim certificates in full thereby incurring outstanding sum yet to be paid to plaintiff - Whether constituted a breach of an essential term of contract - Whether defendant could plead as defence that it was not liable to pay because it had claim of a much larger sum* D *against plaintiff yet to be decided in another civil suit - Whether defendant could make interim certificate the basis of its cross claim - Whether defendant could use its larger counterclaim to set off plaintiff's claim in this suit - Whether plaintiff entitled to judgment*

E This was an application by the plaintiff pursuant to O. 33 r. 2 or O. 14A of the Rules of the High Court 1980 to settle the present dispute between the parties on a summary basis. The plaintiff's claim against the defendant was in respect of a claim for work done for the defendant in the construction of a 16 block single F storey terrace houses for a total contract sum of RM10.1 million. The contract was evidenced by an agreement in writing dated 5 June 1999 whereby the parties had adopted the standard JKR contract. Meanwhile the parties had also entered into a similar contract to construct 331 units of double storey terrace houses. G The defendant had not settled the interim certificates in full as they fell due but in parts thereby incurring an outstanding sum of RM3,665,582.94 yet to be paid to the plaintiff. In this suit the defendant raised the defence that this sum ought to be deducted from the sums that it was claiming against the plaintiff in the H Phase 2 contract which was now pending before the Kuala Lumpur High Court Civil 3 by virtue of the fact that it was entitled to do so under cl. 50 of the standard JKR contract. The parties herein agreed that if the court decided that the defendant was not entitled to deduct the sum it would be claiming in the I Phase 2 Contract then the plaintiff should be at liberty to enter final judgment for the sum of RM3,665,582.94. If the court were to decide otherwise then the parties agreed that the proceeding

in this court should be stayed pending the decision of Civil Court 3 to enable the defendant to contra his counterclaim against the plaintiff's claim in this suit. The question that arose was whether the defendant could use its claim in its amended defence and counterclaim in the Phase 2 suit now pending trial at the Kuala Lumpur High Court Civil 3 to set off the plaintiff's claim to be determined by Civil Court 3 against the sums now being claimed by the plaintiff on the interim certificates (RM3,665,582.94) in the present suit (which was concerned only with the Phase 1 contract).

Held:

(1) The superintending officer had certified the amount that the defendant must pay the plaintiff for the interim. The certified payment to the plaintiff was termed 'interim' only because it was subjected to the final measurement of the actual work that the plaintiff may be able to claim at the end of the contract (in the instant case under cl. 48 of the agreement) by a final certificate. Whatever claims that the defendant may have against the plaintiff with respect to the contract as a whole would have to be determined at the end of the contract by the issuance of a final certificate. (para 26)

(2) A certificate is in essence a statement of ascertained and verified fact which is to be accepted as a statement of truth at face value. The interim certificate therefore constitutes a finality of the assessed value of work done by the contractor which under the terms of the construction contract oblige the employer to pay the contractor the sum certified forthwith. The certificate cannot be varied or cancelled unless agreed to by both the contractor and the employer. The plaintiff herein should therefore be able to receive payment in full of the sums stated in the interim certificates without having to wait for any contra payments that the defendant may be entitled to make against the plaintiff in the future. The sums were due and payable immediately and chargeable as a debt on the defendant. (paras 27 & 28)

(3) A failure on the part of the defendant to pay in full the amount stipulated on the certificates constituted a breach of an essential term of the contract upon which the plaintiff may sue to recover as it had done in this case. It was not open to the defendant to plead as a defence that it was not liable

to pay on the ground that it had a claim of a much larger sum against the plaintiff which was yet to be decided in another civil suit. The defendant could not therefore in law make the interim certificate the basis of the defendant's cross claim in the suit pending in court 3 respecting the Phase 2 contract. The defendant could not use its larger counterclaim in Court 3 to set off the plaintiff's claim in this suit. (paras 29, 30 & 31)

[Plaintiff entitled to judgment with costs.]

Case(s) referred to:

Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC ***(refd)***

Gilbert-Ash (Northern) Ltd v. Modern Engineering (Bristol) Ltd [1973] 3 All ER 195 ***(refd)***

Hartecon JC Sdn Bhd & Anor v. Hartela Contractors Ltd [1997] 2 CLJ 104 CA ***(refd)***

Hiap Tian Soon Construction Pte Ltd and Anor v. Hola Development Pte Ltd and Anor [2003] 1 SLR 667 ***(refd)***

JA Milestone & Sons, Ltd (in liquidation) v. Yates Castle Brewery, Ltd [1938] Vol 2 KBD 439 ***(refd)***

Mahkota Technologies Sdn Bhd v. BS Civil Engineering Sdn Bhd [2000] 7 CLJ 280 HC ***(refd)***

Malayan United Finance Bhd v. Noormurni Sdn Bhd [1988] 1 CLJ 149; [1988] 1 CLJ (Rep) 190 SC ***(refd)***

Morello Sdn Bhd v. Jacques (International) Sdn Bhd [1995] 2 CLJ 23 FC ***(refd)***

Pembenaan Leow Tuck Chui & Sons Sdn Bhd v. Dr. Leela's Medical Centre Sdn Bhd [1995] 2 CLJ 345 SC ***(refd)***

Petroleum Nasional Bhd v. Kerajaan Negeri Terengganu [2003] 4 CLJ 337 CA ***(refd)***

Korso Finance Establishment Anstalt v. John Wedge (Unreported) ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 14A, O. 33 r. 2

Other source(s) referred to:

Kim Lewinson, *The Interpretation of Contracts,* Barrister, London Sweet & Maxwell 1989, pp 65, 66

For the plaintiff - HL Wong; M/s Azman Davidson & Co

For the defendant - CK Yeoh (CH Lai & Jason Chan with him); M/s Ranjit, Ooi & Robert Low

Reported by Suhainah Wahiduddin

JUDGMENT

Kang Hwee Gee J

[1] This was an application by the plaintiff pursuant to O. 33 r. 2 and/or O. 14A of the Rules of the High Court 1980 to settle the present dispute between the parties on a summary basis.

[2] The application was heard before James Foong J (as he then was) in this court. Upon hearing the parties an order had been made by consent of the parties that the case be proceeded with summarily under O. 33 r. 2 and or O. 14A of the Rules of the High Court 1980 without trial based on certain agreed facts and issues to be tried.

[3] The plaintiff's claim against the defendant is in respect of a claim for work done for the defendant in the construction of a 16 blocks of single storey terrace houses for a total contract sum of RM10.1 million.

[4] The contract is evidenced by an agreement in writing dated 5 July 1999 whereby the parties had adopted the standard JKR contract.

[5] Meanwhile the parties had also entered into a similar contract to construct 331 units of double storey terrace houses at Lot PT 1561, Ladang Felda Bukit Cherakah, Mukim Jeram, Daerah Kuala Selangor, Selangor adopting the same standard JKR contract.

[6] Clause 50 of standard JKR contract (substituting the word government for the defendant and contractor for the plaintiff) read as follows:

> **50. Deduction from Money Due to Contractor**
>
> The Government or the S.O. on its behalf shall be entitled to deduct any money owing from the Contractor to the Government under this Contract from any sum which may become due or is payable to the Contractor under this Contract or any other contracts to which the Government and the Contractor are parties thereto. The S.O. in issuing any certificate under Clauses 47 and 48, shall have regard to any such sum so chargeable against the Contractor, provided always that this provision shall not affect any other remedy to which the Government may be entitled for the recovery of such sums.

[7] In the course of construction the superintending officer in the Phase 1 Contract had issued 10 interim certificates of which 4 had been settled leaving 6 certificates due and payable as follows:

Cert No.	Date	Amount Certified (RM)	Due Date for Payment	Amount Overdue as at 1.4.2000 (RM)
5	13.8.99	917,222.90	11.10.99	390,260.71
6	21.9.99	938,015.01	19.11.99	938,015.01
7	25.10.99	645,313.17	23.12.99	645,313,17
8	2.12.99	624,891.39	30.1.00	624,891.39
9	29.12.99	883,127.96	26.2.00	883,127.96
10	3.2.00	183,874.70	1.4.00	183,974.70
			Total	3,665,582.94

[8] The defendant had not settled the interim certificates in full as they fell due but in parts thereby incurring an outstanding sum of RM3,665,582.94 yet to be paid to the plaintiff.

[9] In this suit the defendant raised the defence that this sum ought to be deducted from the sums that it is claiming against the plaintiff in the Phase 2 Contract which is now pending before the Kuala Lumpur High Court Civil 3 by virtue of the fact that it is entitled to do so under cl. 50 of the standard JKR contract.

[10] The parties are agreed that if the court decides that the defendant is not entitled to deduct the sum it would be claiming in the Phase 2 Contract then the plaintiff should be at liberty to enter final judgment for the sum of RM3,665,582.94. If the court decides otherwise then the parties are agreed that the proceeding in this court should be stayed pending the decision of Civil Court 3 to enable the defendant to contra his counter-claim against the plaintiff's claim in this suit.

[11] The questions set out in Schedule 1 are as follows:

1. Whether the defendant can use its claim in its amended defence and counterclaim in the Phase 2 Suit now pending trial at the Kuala Lumpur High Court Civil 3 to set off the plaintiff's claim to be determined by Civil Court 3 against the

sums now being claimed by the plaintiff on the interim certificates (RM3,665,582.94) in the present suit (which is concerned only with the Phase 1 Contract).

2. In determining question 1 above, whether:

   (a) The claim in the amended defence and counterclaim in the Phase 2 Suit falls within the ambit or meaning of the words "any money owing from the contractor to the Government" contained in cl. 50 of the Phase 2 Contract;

   (b) Deduction is to be made therefrom can be certified by the superintending officer of the Phase 2 Contract in the interim certificate that he issued in the Phase 2 Contract.

[12] Submission by counsel for the plaintiff:

1. Clause 50 of the Phase 2 Contract is in *pari materia* with the Phase 1 Contract but it cannot be applied to set off the plaintiff's claim in the Phase 1 Contract. "... under this contract from any sum which may become due or is payable to the contractor under this contract or any other contracts ..." is meant to refer only to claim for damages in the Phase 2 contract which has yet to be proven in the court of law.

2. The defendant is now relying on a certificate issued by the superintending officer for the Phase 2 Contract to say that they are entitled to deduct.

3. This interim certificate was only issued on 25 September 2000 after the plaintiff has already initiated legal proceedings against the defendant by filing a writ of summons in the Phase 2 Contract. Therefore we are saying that under the law the superintending officer is *functus officio* because he had already made certification on the 6 interim certificates for the sum we are now claiming. (See *J.A. Milestone & Sons, Ltd. (in liquidation) v. Yates Castle Brewery, Ltd.* [1938] Vol. 2 KBD 439 at 439 (per Justice Singleton) editorial note:

> Where there is a power to issue certificates in favour of the contractors or of the subcontractors, it is a question of some importance whether the architect, having once issued a certificate, is then *functus officio*, or whether he can issue a further certificate, which would, of course, be in favour of the other type of contractor. What is decided here is that

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> he cannot issue a further certificate after a dispute has arisen between the various parties, because it is then for an arbitrator or the court to say what are the rights of the parties in the circumstances then existing.)

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4. The interim certificate No. 14 which the defendant is now relying on pertains to Phase 2 Contract and the deduction therein is also for the Phase 2 Contract in respect of contra against defective works in the Phase 2 Contract.

Submits: The certificate is irrelevant.

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5. In any case the Phase 2 interim certificate does not mention of the fact that the employer is to be entitled to deduct from the Phase 2 Contract any sum that is owing by the employer in the Phase 1 Contract. (See interim certificate No. 14 dated 25 September 2000 which is issued for the Phase 2 project.)

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6. In the present case in respect of the present claim in the Phase 1 Contract the plaintiff had completed their work and the superintending officer had issued a certificate of practical completion certifying work had been completed as per contract.

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7. See *Pembenaan Leow Tuck Chui & Sons Sdn Bhd v. Dr. Leela's Medical Centre Sdn Bhd* [1995] 2 CLJ 345. Per Edgar Joseph Jr FCJ at pp. 365-366:

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> As for the degree of proof required of a plaintiff builder in O. 14 proceedings based upon an interim certificate issued by an architect or engineer pursuant to a construction contract, this has been variously described in *Ellis Mechanical Services Ltd v. Wates Construction Ltd* [1978] 1 Lloyd's Rep 33 as 'indisputably due' (per Denning MR at p 35), 'as plain as could be' (per Denning MR at p 36) or 'beyond reasonable doubt' (per Bridge LJ at p 37). In his book *Keating on Building Contracts* (4th Ed), Mr Donald Keating QC, under the sub-heading 'Evidence supporting application for summary judgment', at p 279, says this:
>
> > Every case turns upon its facts but excellent evidence is either an admission by the defendant, or his authorized agent, or a certificate by the defendant's architect or engineer, which is a special and formal kind of admission. When evidence of this nature is established the court usually requires cogent evidence from the defendant before it grants leave to defend.

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> Thus merely to allege the existence of defects in the works, or a claim for damages for delay without in each case giving some reasonable amount of detail and of quantification is unlikely to result in leave to defend.

Submits: It is clear in the present Phase 1 Contract the defendant did not say that work done by the plaintiff was defective to entitle them to set off any claim against the plaintiff. They could not therefore make any deduction.

Per Edgar Joseph Jr FCJ at p. 360: (finality of interim certificate)

> We would interpolate, to remark, that the *Dawnays* case did not prevent the owner's or main contractor's cross-claims being litigated or arbitrated at the end of the day, but for all practical purposes, it conferred 'temporary finality' on the certificate and a right to immediate payment in full in the absence of an express contractual provision permitting deduction of the matter in question.

Also at p. 363: (limited right of set-off in contract)

> In our view, therefore, the express enumeration of permitted set-offs in a contract or sub-contract, can imply that a defendant builder or main contractor, as the case may be, is limited to making such deductions from the amounts claimed as fall strictly within the scope of the permitted set-offs, and nothing else, on the basis of the expressio unius principle.
>
> In the present case, there are seven express provisions in the contract to which we have referred whereby the employer has the right of set-off but none of them is relevant to its alleged right to make the set-off for which it contends.

Submits: In the present case the defendant is not relying on any of the limited right of set-off in the Phase 1 Contract.

[13] Submission by defendant's counsel:

The Law

1. As submitted by learned counsel for the plaintiff (which we agree), the leading authority is the Federal Court decision of *Pembenaan Leow Tuck Chui & Sons Sdn Bhd v. Dr Leela's*

Medical Centre Sdn Bhd [1995] 2 CLJ 345 (Item 4, defendant's bundle of authorities ("DBA")). It is important to note the following passages by Edgar Joseph Jr FCJ:

> With all due respect to Lord Denning, for the reasons stated in the later House of Lords case of Gilbert-Ash, *we are unable to agree with him that an interim certificate or indeed any certificate issued* by an architect or engineer pursuant to provisions of the RIBA and other known forms of building contracts and sub-contracts *are to be treated virtually as cash, like a bill of exchange.*
>
> In our view, therefore, *there is no special rule of construction operating in the building contract cases, such as was advocated by Lord Denning* by way of obiter dictum in the *Dawnays* case, which lays down that contracts with provision for payment on certificates negative the ordinary common law right of set-off enunciated in *Mondel v. Steel* (emphasis added).

2. His Lordship continued at p. 361:

> *More particularly, their Lordships made it clear that the proposition that rights of set-off or counterclaim could not be raised in answer to interim certificates, as a matter of course, was quite untenable, and that each case turned upon the particular wording of the contract.* Lord Salmon said ([1974] AC 689 at pp 722–723; [1973] 3 All ER 195 at p 220; [1973] 3 WLR 421 at p 448), and we totally agree, that:
>
> > The parties to building contracts or sub-contracts, like the parties to any other type of contract are, of course, entitled to incorporate in their contract any clause they please. There is nothing to prevent them from extinguishing, curtailing or enlarging the ordinary rights of set-off, provided they do so expressly or by clear implication. (emphasis added.)

3. The ratio of *Pembenaan Leow Tuck Chui* is found at p. 363:

> In our view, therefore, the express enumeration of permitted set-offs in a contract or sub-contract, can imply that a defendant builder or main contractor, as the case may be, is limited to making such deductions from the amounts claimed as fall strictly within the scope of the permitted set-offs, and nothing else, on the basis of the *expressio unius* principle.

In the present case, there are seven express provisions in the contract to which we have referred whereby the employer has the right of set-off but none of them is relevant to its alleged right to make the set-off for which it contends.

In our view, regard being had to these provisions of the contract, and applying the expressio unius principle, so far as claims for payment on certificates are concerned, the ordinary common law right of set-off had, in the words of Lord Salmon in the Gilbert-Ash case ([1974] AC 689 at pp 722–723; [1973] 3 All ER 195 at p 220; [1973] 3 WLR 421 at p 448) quoted above, *been extinguished, not expressly but by clear implication.*

4. In short, the following are *inter alia* the principles that can be distilled from *Pembenaan Leow Tuck Chui:*

   4.1 An interim certificate is not to be treated like cash ie, like a bill of exchange.

   4.2 The right of set-off is always available in answer to interim certificates.

   4.3 There is no special rule of construction operating in the building contract cases. Each case turns upon the particular wording of the contract.

   4.4 The right of set-off can be extinguished expressly or by clear implication on the basis of the *expressio unius* principle (which was what happened in *Pembenaan Leow Tuck Chui*).

5. In this regard, we can also take guidance from a Singapore Court of Appeal decision. In *Hiap Tian Soon Construction Pte Ltd and Anor v. Hola Development Pte Ltd and Anor* [2003] 1 SLR 667, the Court of Appeal held that in a building contract, it is presumed that each party is entitled to *inter alia* the right of set-off. However, it is open to parties to rebut that presumption to exclude the defence of set-off or by crafting additional provisions to import the concept of temporary finality into the contract. If the parties choose not to do so, then the right of set-off remains intact. (See: p. 8, Item 3, DBA.)

6. In our case, cl. 50 of the Phase 2 Contract clearly does not come within the ambit of the ratio of *Pembenaan Leow Tuck Chui.* Unlike *Pembenaan Leow Tuck Chui*, which has 7 express provisions for set-off, cl. 50 is the specific set-off provision in

A the Phase 2 Contract. There are no clauses in the Phase 2 Contract to import the concept of temporary finality. As such, the defendant has preserved its common law right of set-off as provided by cl. 50.

B **The Law On Interpretation Of Contracts And The Interpretation Of cl. 50**

(i) The law on interpretation of contracts

7. Given that each case turns upon the particular wording of the C contract, His Lordship Edgar Joseph Jr in another Federal Court decision, *Morello Sdn Bhd v. Jacques (International) Sdn Bhd* [1995] 2 CLJ 23 at p. 31 is instructive:

> *For the purposes of construction of contracts, the intention of the* D *parties is the meaning of the words they have used.* In *Schuler (L) AG v. Wickman Machine Tool Sales Ltd* [1974] AC 235; [1973] 2 All ER 39; [1973] 2 WLR 683, Lord Simon of Glaisdale approved the following passage in *Norton on Deeds* (2nd Ed) at p 50:
>
> E … the question to be answered always is, 'What is the meaning of what the parties have said?' not 'What did the parties mean to say?' … it being a presumption juris et de jure … that the parties intended to say that which they have said (emphasis added).

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8. The golden rule in interpreting the meaning of the words used in a contract is that the words of a contract should be construed in their grammatical and ordinary meaning, except to the extent that some modification is necessary in order to G avoid absurdity, inconsistency or repugnancy (See: pp. 65 and 66, *The Interpretation of Contracts* by Kim Lewinson, Barrister, London Sweet & Maxwell 1989).

(ii) Interpretation of cl. 50

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Sub Issue 2(a): "… any money owing …"

9. The question to be answered here is whether the amended defence and counterclaim (of the S3 Suit) falls within the ambit or meaning of the words "any money owing from the I contractor (plaintiff) to the Government (defendant)".

10. The amended defence and counterclaim is essentially a claim for damages out of which a sum of RM26,091,135.10 has been certified under Interim Certificate No. 14 in the Phase 2 Contract.

11. What is the meaning of the phrase "any money owing". The plaintiff submitted that it is merely a claim for damages which is unproven in the court of law and that the law does not recognize contingent debt. We submit that the plaintiff's submission is erroneous for the following reasons.

12. In *Hiap Tian Soon Construction Pte Ltd* the clause in question is cl. 2(1) which is found at p. 6 of the judgment. The relevant part of the clause is "... shall be recoverable from the contractor by the employer as a debt or may be deducted by him from any money due or to become due to the contractor under this contract".

13. We submit that the phrase in *Hiap Tian* is "money due or to become" due whereas ours is "any money owing". However, we submit that the phrase in its grammatical and ordinary meaning means the same. In this regard, the Singapore Court of Appeal held that all that is required from the party purporting to exercise the right of set-off is to quantify his loss in a *bona fide* way by reasonable means. The party does not have to produce a specific and final figure quantified by professional quantity surveyors. The estimated figure, regardless whether it is too high or too low is not a bar to the defence of set-off (see: Item 3, pp. 9, 10).

14. In *Mahkota Technologies Sdn Bhd (formerly known as The General Electric Co (M) Sdn Bhd) v. BS Civil Engineering Sdn Bhd* [2000] 7 CLJ 280 (Item 5, DBA), His Lordship Vincent Ng J was interpreting cl. 13 which reads as follows:

> The Contractor shall notwithstanding anything in this sub-contract be entitled to deduct from or set-off against any money due from him to the Sub-contractor (including any Retention Money) any sum or sums which the Sub-contractor is liable to pay to the contractor under this Sub-Contract (emphasis added).

15. His Lordship Vincent J dismissed the plaintiff's appeal (for leave to enter summary judgment) and granted the defendant leave to defend. The learned judge was of the view that defendant's right of set-off was preserved by cl. 13 and since the defendant has a counter-claim far in excess of the plaintiff's claim, unconditional leave to defend was granted. It must be noted that the defendant quantified its claim but did not produce any architect's certificate pertaining to the alleged loss suffered.

> under this contract or any other contracts

16. This phrase was interpreted in *Gilbert-Ash (Northern) Ltd v. Modern Engineering (Bristol) Ltd* [1973] 3 All ER 195 (Item 6, DBA). The relevant clause is found at p. 199. The phrase in question was "… with this or any other contract", which almost *pari materia* with our contract. This phrase was taken to mean its literal meaning. His Lordship Lord Reid (at p. 200) interpreted the phrase in the following manner:

> It is true that this provision goes a very long way if that is its meaning, because it would allow deduction of all detailed claim outstanding under other contracts.

Lord Morris (at p. 204) has this to say:

> Such claim may be in connection with the contract which has occasioned the certified payments or in connection with any other contract.

17. In short, what is needed is for the defendant to quantify its claim in a *bona fide* manner. The defendant in exercising its right of set-off need not prove its claim as submitted by the plaintiff. So long as the defendant has quantified its claim in a *bona fide* manner, the defendant, under cl. 50 of the Phase 2 Contract is entitled to exercise his rights of set-off under the Phase 2 Contract as well as the Phase 1 Contract.

18. In any event, the defendant has not only quantified its claim in a *bona fide* manner. Part of the defendant's counter-claim (under the S3 Suit) is supported by Interim Certificate No. 14. This is clearly consistent with the *dicta* of Edgar Joseph Jr FCJ in *Pembenaan Leow Tuck Chui* who stated that one must give some reasonable amount of detail and quantification.

19. My learned friend also quoted an extract from *Keating on Building Contracts* which was reproduced in *Pembenaan Leow Tuck Chui*. It must be noted that the learned author was also of the view that if the defendant provides cogent evidence then the defendant should be entitled to obtain leave to defend. Hence, my learned friend's reliance on this extract does not enhance its case. In fact, it supports ours.

Sub Issue 2(b)

20. Relying on the principles enunciated in *Hiap Tian Soon Construction Pte Ltd* and *Mahkota Technogies* and the *dicta* of *Pembenaan Leow Tuck Chui*, there is clearly no requirement for the Consultant or the Supervising Officer under the Phase 2 Contract and/or the Phase 1 Contract to issue a certificate to make such deductions.

21. Reference can also be made to Lord Reid's observation in *Gilbert Ash* at p. 199 where His Lordship said:

> There is no reference to the amount of the contractor's claim in respect of the breaches of contract and no requirement that before withholding payment he need even estimate the amount of his claim. Read literally this provision would entitle the contractor to withhold sums far in excess of any fair estimate of the value of his claims …
>
> It was argued that this sentence can be interpreted as meaning that the money withheld must not exceed the value of the contractor's claim. But to attach such a meaning would go far beyond construing the words of the contract. It would be necessary to insert at the end such words – not exceeding in all a fair estimate of the value of claims in respect of breach of such condition. That would not be construction but adding words which are not there …

22. Be that as it may, the SO has in fact certified the amount to be deducted under the Phase 2 Contract *vide* Interim Certificate No. 14.

23. Further, the plaintiff's submission that the SO of the Phase 1 Contract must issue the certificate is clearly untenable. Phase 2 Contract and the Phase 1 Contract are 2 different projects. Clearly the SOs are different. The SO in the Phase 1 Contract would clearly not be in the position to make any certification

in relation to the losses and damages suffered by the plaintiff as the damages suffered occurred in the Phase 2 Project and not the Phase 1 Contract.

The Plaintiff Is Estopped From Raising This Issue *Vide* encl. 31

24. The plaintiff has previously filed for summary judgment. It was heard by the SAR and dismissed on 6 September 2002. On appeal, the appeal was also dismissed by James Foong J on 17 July 2003.

25. Bearing the above in mind, we submit that the plaintiff is estopped from raising this issue again *vide* encl. 31.

26. There are 2 kinds of estoppel *per rem judicatum* (See: *Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783). We are interested in the 2nd type, namely issue estoppel.

27. In *Malayan United Finance Bhd v. Noormurni Sdn Bhd* [1988] 1 CLJ 149; [1988] 1 CLJ (Rep) 190, the Supreme Court applied issue estoppel and held that the plaintiff was estopped from filing summary judgment on the same issue in the 2nd Suit after the application for summary judgment was dismissed on similar ground in the 1st Suit.

28. In *Hartecon JC Sdn Bhd & Anor v. Hartela Contractors Ltd* [1997] 2 CLJ 104, the Court of Appeal held that a decision by the court at one stage on a particular matter or issue is binding on it at a later stage in the same suit or in a subsequent suit.

29. By reason of the above, the plaintiff is clearly estopped from filing encl. 31 as the interpretation of cl. 50 of the Phase 2 Contract was fully ventilated and upheld in favour of the defendant during the summary judgment application.

Findings And Decision

[14] The perimeter within which the issue is to be decided:

Whether defendant can use its larger counterclaim in the other court (Civil Court 3) to set off the plaintiff's claim in this suit.

[15] In so deciding, this court is to consider: A

Whether the defendant's claim in its counterclaim (as amended) comes within the meaning of "any money owing from the contractor (the plaintiff contractor) to the Government (the defendant employer)" as stated in cl. 50 of the Phase 2 contract. B

[16] Whether the superintending officer in the Phase 2 Contract can certify the deductions to be made (from the plaintiff's claim in the present suit) in the interim certificate he issued in the Phase 2 Contract. C

The Interpretation

[17] Clause 50 does not require any interpretation beyond its literal meaning.

[18] Where an employer and the contractor are engaged in more than one contracts (as in the present case) deductions of sums due to the employer on one contract may be made on the sums certified by the superintending officer on the interim certificate to be due to the contractor in the other, and *vice versa*. D E

[19] The superintending officer in the Phase 2 Contract should be able under cl. 50 make a deduction in the interim certificate any sums due to the employer from the Phase 1 Contract and make a certification of the net sum that the contractor should be able to claim from the employer on that certificate. F

[20] It is also settled law that the employer is perfectly entitled under the common law to bring a counterclaim or set-off in the Phase 2 suit by the plaintiff for any sums due to him including any claim for loss and damages in the Phase I Contract including any sums certified by the superintending officer in the Phase 1 Contract. The *Leela Ratos* case had made it clear that it is open to a defendant defending a plaintiff's claim for summary judgment under O. 14 which is based on an interim certificate to plead a defence of set-off or counterclaim against the amount claimed any damages which he had sustained as a result of the plaintiff's breach of contract unless the terms and conditions in that contract restricts such right. G H

[21] The CLJ summarised the relevant part of the Federal Court judgment in its report as follows: I

A [3] In a building contract of this nature, the ordinary common law right of set-off applicable is that, when the person for whom the work has been done is sued by the contractor for the price, it is open to the defendant, in the absence of a provision in the contract to the contrary, to defend himself by setting off against the amount claimed, any damages which he has sustained as a result of the plaintiff's breach of the contract. However, on the basis of *expressio unius* principle, the express enumeration of permitted set-offs in a building contract can imply that a defendant builder or main contractor, as the case may be, is limited to making such deductions from the amounts claimed as fall strictly within the scope of the permitted set-offs, and nothing else.

[22] The Federal Court/ Supreme Court in that case did go so far as to decide on the merit the specific question of whether a defendant can by his counterclaim deduct from the plaintiff's certified claim on the interim certificates issued by the superintending officer in a construction contract. In essence all that the court decided was that it was open to the defendant in an O. 14 application to raise a defence of a cross claim for damages which the defendant has sustained as a result of the plaintiff's breach.

[23] It is to be noted that here we are not dealing with an application for summary judgment under O. 14, where the scope of the inquiry would be limited to discovering whether there is a triable issue but a hearing on the merit of the narrative under O. 14A agreed upon before the previous judge James Foong J (as he then was). The issue that must be resolved in the narrative of the present claim therefore goes beyond the mere question of whether it is open to the defendant to bring a claim under the common law.

[24] An O. 14 is different in nature from an O. 14A. Under O. 14 the court has to decide whether there is a triable issue that ought to go for trial whereas under O. 14A the court makes an actual determination on any question of law or construction of any documents and makes a decision as to whether the action should be allowed or be dismissed. See *Petroleum Nasional Bhd v. Kerajaan Negeri Terengganu* [2003] 4 CLJ 337 where Mohd Noor Ahmad JCA adopts the procedure in the English case of *Korso Finance Establishment Anstalt v. John Wedge* (unreported, February 15 1994 (CA) Transcript No. 14/387) as follows:

(1) An issue is 'a disputed point of fact or law relied on by way of claim or defence'.

(2) A question of construction is well capable of constituting an issue.

(3) If a question of construction will finally determine whether an important issue is suitable for determination under O. 14A and where it is a dominant feature of the case a court ought to proceed to so determine such issue.

(4) Respondents to an application under O. 14A are not entitled to contend they should be allowed to hunt around for evidence or something, that might run up on discovery which could be relied upon to explain or modify the meaning of the relevant document. If these were material circumstances of which the court should take account in construing the document, they must be taken to have been known, and could only be such as were known, to the parties when the agreement was made, in the absence of such evidence the court should not refrain from dealing with the application (see *The Supreme Court Practice* 1999 Vol 1 para 14A/2/5).

[25] The question to be answered:

The question to be answered in this application will have to go beyond the scope of an O. 14 application. It requires the specific determination as a matter of law on the merit whether the counterclaim or set-off the sums on the interim certificates certified by the superintending officer in the Phase 1 Contract can be deducted from the plaintiff's claim in this Phase 2 Contract.

[26] Having examined the 6 interim certificates it is clear that the superintending officer had certified the amount that the defendant must pay the plaintiff for the interim. The certified payment to the plaintiff is termed 'interim' only because it is subjected to the final measurement of the actual work that the plaintiff may be able to claim at the end of the contract (in the instant case under cl. 48 of the agreement) by a final certificate. Whatever claims that the defendant may have against the plaintiff with respect to the contract as a whole would have to be determined at the end of the contract by the issuance of a final certificate.

[27] A certificate is in essence a statement of ascertained and verified fact which is to be accepted as a statement of truth at face value. The interim certificate therefore constitutes a finality of the assessed value of work done by the contractor which under the terms of the construction contract oblige the employer to pay the contractor the sum certified forthwith. The certificate cannot be varied or cancelled unless agreed to by both the contractor and the employer.

[28] This must necessarily mean that the plaintiff in the instant case should therefore be able to receive payment in full of the sums stated in the interim certificates without having to wait for any contra payments that the defendant may be entitled to make against the plaintiff in the future. The sums were due and payable immediately and chargeable as a debt on the defendant.

[29] A failure on the part of the defendant to pay in full the amount stipulated on the certificates constitutes a breach of an essential term of the contract upon which the plaintiff may sue to recover as it has done in this case. It is not open to the defendant to plead as a defence that it is not liable to pay on the ground that it has a claim of a much larger sum against the plaintiff which has yet to be decided in another civil suit.

[30] It follows therefore the defendant cannot therefore in law make the interim certificate the basis of the defendant's cross claim in the suit pending in Court 3 respecting the Phase 2 Contract.

The Answer:

[31] The defendant cannot use its larger counterclaim in Court 3 to set off the plaintiff's claim in this suit.

[32] The plaintiff is entitled to judgment with costs.